

# **Exhibit PPP**

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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 DEIRDRE MACNAMARA, et al.,

4 Plaintiffs,

5 v.

04 Civ. 9216

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----x

9 New York, N.Y.  
9 August 29, 2005  
10 10:00 a.m.

11 Before:

12 HON. KENNETH M. KARAS,

13 District Judge

14 APPEARANCES

15 MOORE & GOODMAN (by telephone)

15 Attorneys for plaintiff

16 BY: DAVID MILTON

17 MICHAEL CARDOZO

17 Corporation Counsel for the City of New York

18 BY: JAMES MIRRO (by telephone)

18 FRED WHILER

19 Assistant Corporation Counsel

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1 (In chambers)

2 THE COURT: Good morning, everybody. Who do we have?

3 MR. MIRRO: It is James Mirro for the city and I am  
4 here with Fred Whiler, my colleague.

5 MR. MILTON: And David Milton for the plaintiffs.

6 THE COURT: Good morning. Officially we are calling  
7 McNamara et al. v. City of New York 004 Civ. 9216. Just so  
8 everybody knows, there is a court reporter taking down what you  
9 say, so be nice.

10 I have had a chance to read the letters and I have had  
11 a chance to read some of the cases that are discussed therein,  
12 and of course I want to make sure we don't trip up on any

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13 unnecessary disputes.  
 14 with respect to the notes, I had a chance to read what  
 15 Mr. Mirro said in a letter, so it is time for a surreply from  
 16 plaintiff.  
 17 MR. MILTON: OK. Yes, I just got that this morning,  
 18 so I would like a chance to reply.  
 19 THE COURT: That's what I am letting you do. This is  
 20 Mr. Milton, right?  
 21 MR. MILTON: Right.  
 22 THE COURT: One thing we have to do is identify  
 23 ourselves for the court reporter. Otherwise it will just say  
 24 unknown male. Go ahead, Mr. Milton.  
 25 MR. MILTON: You want a verbal surreply right now?  
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1 THE COURT: If you think you really want more time I  
 2 will give it to you, but trees have died for the papers in  
 3 these cases.  
 4 MR. MILTON: I don't want to kill any more trees.  
 5 He has to show substantial need and that it is not an  
 6 automatic waiver and that part of his showing would have to be  
 7 that sort of specific matters would have to be the subject of  
 8 the testimony and that one question, did you review this, yes,  
 9 I reviewed it, did it refresh your recollection, is not enough,  
 10 as I understand the cases, to trigger the sort of broad waiver  
 11 of either the work product protection or the attorney-client  
 12 privilege. Having been on the other side of this dispute I  
 13 realize that it was not an automatic waiver but it is a  
 14 balancing test.  
 15 MR. MIRRO: Your Honor, can I respond to that?  
 16 THE COURT: Yes, of course.  
 17 MR. MIRRO: First, I respectfully disagree with  
 18 Mr. Milton on the notes. There are two bases for discovery of  
 19 the notes. Under Rule 26 there is the exceptional  
 20 circumstances or specific need showing. We are not relying on  
 21 that, although I will address the specific need in a moment.  
 22 We are primarily relying on the Federal Rule of Evidence rule  
 23 which I cited, I believe it is 612, and the case law is very  
 24 clear, and there is ample case law that where the witness  
 25 giving deposition testimony has refreshed recollection by  
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1 reviewing notes or another document, that material is subject  
 2 to discovery because the deposing parties is entitled to  
 3 cross-examine, and even if there were a requirement of specific  
 4 need I think we could establish the specific need, although I  
 5 am not relying on it, because obviously the opposing party, in  
 6 this case the plaintiff, has access to those notes. We do not  
 7 have access to the notes.  
 8 With respect to the notes and the account of the  
 9 incident, certainly much closer in time to the incident than  
 10 the plaintiff's deposition, we believe that it would be unfair  
 11 for the plaintiffs alone to have access to those documents and  
 12 not for us to have access to the documents, in addition to  
 13 refreshing recollection.  
 14 So there is need on our part.  
 15 THE COURT: Mr. Milton, do you want to respond?  
 16 MR. MILTON: Yes, and just briefly again, without  
 17 whining here, I got this this morning. We have not gotten the  
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18 transcript from the deposition until this morning. But I will  
 19 endeavor to try. Based on what I understand to be the case  
 20 law, we are talking about the account of the incident, we are  
 21 not claiming attorney-client privilege for that but as work  
 22 product it would be subject to a requirement of substantial  
 23 need, and nothing in this testimony as I recall -- I mean,  
 24 there was one question about the account and so I don't see how  
 25 he has made that showing.

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1 MR. MIRRO: I have a case directly on point, frankly,  
 2 that I think is directly on point.

3 THE COURT: All right, look. I have read Ehrlich,  
 4 Judge Sweet's decision, 848 F. Supp. 482. But in fairness to  
 5 Mr. Milton, even though I am loathe to -- I am prepared to  
 6 decide this but not if Mr. Milton hasn't had a fair opportunity  
 7 to read the cases.

8 Mr. Mirro, there is nothing wrong with you trying to  
 9 get the last word but sometimes you don't get the last word.

10 MR. MIRRO: I appreciate that. I am happy for  
 11 Mr. Milton to get his side heard.

12 THE COURT: Mr. Milton, for what it is worth, I did  
 13 not read the other cases that Mr. Mirro cited, but I think that  
 14 Ehrlich distinguishes the Rule 26 that Mr. Mirro would make  
 15 versus the evidence 612 showing that he has to make. But I  
 16 will give you a chance if you want to take a look, and if it  
 17 turns out that you are right, you can let Mr. Mirro know and we  
 18 can do another quick call, rather than kill trees.

19 MR. MILTON: So I am given the opportunity to either  
 20 concede the point or if I don't I will come up with my great  
 21 cases and we will get back on the phone?

22 THE COURT: Precisely.

23 With respect to the book and dissertation --

24 MR. MIRRO: Your Honor, may I ask a question for  
 25 clarification?

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1 THE COURT: Sure.

2 MR. MIRRO: Are you treating the notes and the account  
 3 that was provided to the lawyer in the same way?

4 THE COURT: I don't see why not.

5 MR. MIRRO: I just wanted to clarify.

6 THE COURT: The issue is joined and the question is  
 7 what showing you need to make. I am not sure you haven't made  
 8 a showing even if you had to do it under Rule 26. But I think  
 9 it is fairly clear under 612 that when somebody uses that kind  
 10 of material to refresh his or her recollection that it is a  
 11 waiver, but I definitely want to give Mr. Milton a chance to  
 12 see if it is wrong.

13 Mr. Mirro, I realize that you work for a government  
 14 agency, but why don't you go buy Professor Thomas's book  
 15 yourself?

16 MR. MIRRO: Your Honor, good question, and I think the  
 17 answer is, this is a purported class action case which is going  
 18 to encompass, if it is certified, which we think it should not  
 19 be, 1,800 plaintiffs. As it stands now, there are 24.  
 20 Frankly, your Honor, we have been running around just trying to  
 21 get basic fundamental stuff in terms of discovery that we think  
 22 we are entitled to. We think that we are entitled to that book

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23 and the dissertation under the federal rules, and I hate to set  
24 a precedent where, you know, every time there was something  
25 available in some other office or in some bookstore somewhere

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1 they could send us running for it if we are entitled to it  
2 under the rules. Frankly, we could go out and buy that book.  
3 I assume it is available. I don't know for sure that it is  
4 available. But my question would be why aren't they obligated  
5 to provide it under the rules.

6 THE COURT: I haven't Googled it myself and I  
7 understand the principle.

8 MR. MIRRO: I would be happy to go out and buy it and  
9 if your Honor directs us to do that, we would do that. But  
10 there are significant discovery defaults here and we are doing  
11 our best to keep this whole thing together, and that sort of  
12 precedent would be difficult for us.

13 THE COURT: Understood. Mr. Milton, to the extent  
14 that your client has some history of political protest and  
15 since the core of this is the question of what if any  
16 protesting your client might have been doing -- this is  
17 Professor Thomas I am talking about here -- why wouldn't this  
18 be relevant at least for purposes of discovery?

19 MR. MILTON: Right, and, respectfully, I disagree with  
20 that characterization that my client has a history of political  
21 protest. He is an art history professor, and in response to  
22 your question, did your book about the Lincoln Memorial deal  
23 with political protest -- that was the question at the  
24 deposition -- the response was, well, given the history of that  
25 memorial in American life, it would be impossible not to deal

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1 with the question of political protest in writing about its  
2 history. But it is a long way from that to, he is on the  
3 streets every day as a hardened activist. He is an art history  
4 professor. We are not going to kick and scream and take an  
5 interlocutory appeal, but this is far afield.

6 THE COURT: You know, I went to college with an econ  
7 major, but he also protested. To say he is an art history  
8 professor isn't mutually exclusive.

9 MR. MILTON: But he is an art history teacher who  
10 testified that he had not been a political protester.

11 MR. MIRRO: Your Honor, with all due respect I don't  
12 view this as a close call at all. Here is a gentleman who  
13 testified that he has written a book and he testified in his  
14 deposition that it deals with political protest and civil  
15 disobedience. We are talking about discovery here, not  
16 admissibility, and we wouldn't even suggest that the book might  
17 not be admissible at this point. But it is certainly in my  
18 view discoverable where he says that he has discussed political  
19 protest and civil disobedience in the book, and the  
20 dissertation.

21 THE COURT: Yes, I have to say, Mr. Milton, I don't  
22 disagree with that. It seems that there will be credibility  
23 issues about what Professor Thomas was doing around the time he  
24 was arrested. His allegation is that he was doing nothing even  
25 in the way of protest, as I understand it, nothing illegal --

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1 not that protest is illegal. So why wouldn't that to some  
2 extent go to what he was doing at the premises at the time that  
3 he was arrested and also go to his credibility?

4 MR. MILTON: I think even the way, from my  
5 perspective, you have just phrased it, suggests that it is not  
6 relevant. What he wrote 15 years ago about the Lincoln  
7 Memorial, which no one would dispute is a site of political  
8 protest, for me it is the ultimate stretch to go from there to  
9 say he must have been engaging in civil disobedience or some  
10 sort of unlawful protest during the Republican Convention. I  
11 don't see how the one goes to even his credibility.

12 THE COURT: I didn't say that he must have been. The  
13 question is, for purposes of discovery, whether it is relevant.  
14 I couldn't agree with you more. Look, even if he participated  
15 in a protest a week 15 years ago doesn't mean that he must have  
16 been here to protest whatever people were protesting, I agree  
17 with you. The question is whether or not it has some relevance  
18 or can lead to relevant information and I don't know how it can  
19 be said that it would fail both those tests.

20 MR. MILTON: I am not going to belabor the point. The  
21 book is publicly available. We are obviously not trying to  
22 hide anything. We will comply with any order if I can't  
23 persuade you that it is pretty far afield, how what he writes  
24 10 years ago has anything to do with a highly charged situation  
25 totally removed from a academic study. But if we are being

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1 directed to turn it over, so be it. We have no objection.

2 THE COURT: Look, it is certainly not the epicenter of  
3 the case, I will give you that. But the burden that Mr. Mirro  
4 must meet is fairly low, as you know. I think it is  
5 discoverable under Rule 26 so I think it should be turned over.

6 With respect to the question of medical records and  
7 medical history, both physical and psychological, it seems to  
8 me that -- and even in the cases I read before I got  
9 Mr. Mirro's August 26 letter -- to the extent that your  
10 allegations, Mr. Milton, are very general and your claims of  
11 injury are very general, why isn't it commensurate with that  
12 that there is a greater need on behalf of defendants to find  
13 out the medical history, both psychological and physical, of  
14 your client? If you had claimed, for example, that he broke  
15 his leg, whether or not he had a toothache 10 years ago it  
16 seems to be would be irrelevant. Failing that, it seems  
17 because it is a very general and broad statement -- and the  
18 Northern District case that you described by Judge Pauley as  
19 being the minority view, where the garden variety type of claim  
20 really does not allow a plaintiff in that situation to restrict  
21 access to medical history information. Do you have any greater  
22 sense of what it is your client actually suffered from so maybe  
23 there is a way to narrow this?

24 MR. MILTON: Yes, there is, your Honor. In response  
25 to the interrogatories of all 24 plaintiffs, one of the

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1 questions was please describe in detail all categories of  
2 damages and all physical, emotional and psychological injuries,  
3 and we in response to those detail specifically what injuries

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4 emotional and physical our clients are alleging. So there is a  
5 more specific basis than the complaint.

6 In response to that, for example, no one is claiming,  
7 say, dental injuries, and we didn't turn over dental records,  
8 or gynecological, totally unrelated medical records.  
9 Concerning the psychological records, I note again just looking  
10 at this this morning, the cases cited for this principle of  
11 putting medical and psychological issues in question, both were  
12 pre-Jaffe v. Redmond, a Supreme Court case from 1996  
13 recognizing the psychotherapist-patient privilege. In that  
14 they also, I think, addressed the issue of putting things in  
15 issue and said there is not to be a balancing test and that the  
16 interest in recognizing the privilege would not be served if  
17 subsequently there would be a judicial determination, well,  
18 this is relevant, this isn't relevant.

19 MR. MIRRO: Can I address that, your Honor?

20 THE COURT: I have a couple questions for Mr. Milton  
21 first. I am looking at response interrogatory No. 4, and this  
22 is plaintiff William Steyert, Jr., responses, response No. 4,  
23 and you said they were all the same. The interrogatory states  
24 identify all injuries claimed by plaintiff as a result of the  
25 incident and the medical, psychiatric, psychological and other

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1 treatment provided, if any. Response, worry and anxiety as a  
2 result of my false and unjust arrest. The conditions at Pier  
3 57 caused anxiety for mental condition and health.

4 So dental situations, you are right, become  
5 irrelevant, arthroscopic surgery is irrelevant, you name it.  
6 But psychological, this is still fairly generic and I am  
7 wondering why psychological history wouldn't be relevant to  
8 this claim.

9 MR. MILTON: Right, and I think it is precisely  
10 because it is generic that the records aren't relevant. If we  
11 claim, for example, and I believe that with one of our  
12 plaintiffs -- if we claim, for example, that someone is now  
13 suffering from claustrophobia, and a more diagnosable specific  
14 medical injury as opposed to what we are calling garden-variety  
15 distress, to the extent someone has a more specific injury,  
16 yes, it is relevant, but anxiety, worry, to me how we intend  
17 that, it is upsetting to be arrested for what we claim is  
18 obviously without justification, and then to be held for two  
19 days for, essentially, like, a ticket, in the conditions as we  
20 allege them. It sort of adds insult to injury to then have to  
21 disclose your entire family history and whatever else might be  
22 the subject of your therapy when this is a sort of stand-alone  
23 upsetting incident, and we are not claiming anything more and  
24 we will stipulate that we are not claiming for those plaintiffs  
25 anything more than what these cases call garden variety

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1 emotional distress.

2 THE COURT: I do have to say, I think you have to be  
3 careful how you phrase what I am saying. I don't doubt for a  
4 minute that being arrested at all is a very anxious moment and  
5 can cause a tremendous amount of anxiety and distress, let  
6 alone the ticket and being detained for two days. I am not  
7 trying to diminish what it is that your client is claiming. My  
8 point is, to the extent that you are going to ask a jury to



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9 award damages from the anxiety as a form of psychological  
10 trauma, potentially a very serious form of psychological  
11 trauma, it seems to me that puts into play any sort of  
12 psychological history that would explain what it is that might  
13 cause anxiety in your client and what kind of damages he or she  
14 is entitled to as a result of the anxiety that presumably you  
15 would have shown unfairly resulted from what you would say is  
16 an unlawful arrest.

17 So I just think that the cases that I have read, and  
18 it is not a question of balancing, it is a question of whether  
19 the privilege has been waived, that when you talk about general  
20 psychological damages, the history becomes relevant, and it  
21 seems that the cases say it is waived.

22 Mr. Mirro.

23 MR. MIRRO: Thank you, your Honor. I think we are on  
24 the same page. I think I would have said the same things that  
25 you just said, your Honor, which I am happy about. Let me just

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1 add -- let me see. I am sorry, your Honor, I sort of blanked  
2 out. I think we are on the same page with that. I don't think  
3 I have anything else to add right now.

4 THE COURT: Mr. Milton, do you want to say anything  
5 else?

6 MR. MILTON: Well, I mean, again, I guess we have a  
7 somewhat different view of what is and isn't relevant here in  
8 terms of what is being put in issue. For example, some people  
9 say they had a history of abuse with their family and now they  
10 are in therapy and they have been in therapy before this, and  
11 this incident is its own incident, which everybody agrees as we  
12 allege would be a distressing one. Then I still don't see why  
13 the defendants then get to fish around in their history with  
14 their parents to refute that their treatment by the defendants  
15 is upsetting. We are not claiming that now they can't hold a  
16 job. For someone whose damages are limited to their testimony  
17 that this was an awful experience, I was so upset, now it is  
18 very difficult for me to be around police, a sort of general  
19 bad reaction to this, I still don't see how the more obviously  
20 intimate details of their life are relevant. Further,  
21 disclosing them for our clients will produce enormous anxiety  
22 by itself.

23 THE COURT: One thought I had was, if there is some  
24 extraordinarily sensitive part of a client's medical history --  
25 let's say by way of example, since you seem to be invoking it,

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1 some history of child abuse, leads to a lot of adult therapy,  
2 in that circumstance, Mr. Mirro, why can't Mr. Milton submit  
3 that to me for some sort of ex parte review?

4 MR. MIRRO: Your Honor, we would entirely on board  
5 with that. If there is a particular issue with respect to a  
6 particular plaintiff, we could reduce this dispute down to that  
7 minute disagreement and we would be on board with that. We are  
8 not trying to trick anybody, we are not trying to embarrass  
9 anybody. We are willing to play this game straight. But we  
10 just need to, you know, examine, properly examine the  
11 plaintiffs. So I would agree with that, your Honor.

12 Let me make a couple other points now that I have my  
13 thoughts straight with respect to these issues. First, there

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14 was a question about the interrogatories. Even with the  
 15 interrogatory answers, which arguably somewhat narrow the scope  
 16 of the plaintiffs' claims --

17 THE COURT: They narrowed them. Physical injuries are  
 18 out, for example. I don't think you would be entitled to  
 19 medical history from an orthopedic surgeon based on that  
 20 answer.

21 MR. MIRRO: I agree, your Honor, we are not claiming  
 22 that everything is relevant. Are you suggesting, your Honor,  
 23 that given the answer here in No. 4 that we should not collect  
 24 medical records aside from psychological?

25 THE COURT: Under what theory would you be entitled to  
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 that?

1 MR. MIRRO: First, your Honor, I am not sure that the  
 2 response given in No. 4 here is the final answer.

3 THE COURT: Let's assume it is.

4 MR. MIRRO: Frankly, I think if we are willing to  
 5 stipulate that particular plaintiffs have no physical injuries,  
 6 then, you know, I think that we would be willing to stipulate  
 7 to it as well. But I would just, you know, in my mind I am  
 8 thinking there is still a complaint out there that says they  
 9 have physical injuries including pain and suffering, and I  
 10 don't know if they are going to give that up at the end of the  
 11 day.

12 MR. MILTON: He has interrogatory responses under  
 13 oath. If he suddenly claims that he has a broken leg, that  
 14 claim is not going to go very far. That is the purpose of the  
 15 interrogatories. We have committed ourselves and you will have  
 16 additional chance to depose them. If he comes up with a  
 17 physical injury to his teeth, we will have to turn over his  
 18 dental records and we will look like idiots.

19 MR. MIRRO: I am happy to hear that. We would be  
 20 happy to enter into a stipulation with respect to each of the  
 21 plaintiffs and I would volunteer to draft it, whereby they  
 22 waive all claims of physical injury except what they have given  
 23 in their interrogatory answers.

24 MR. MILTON: I would object to signing a stipulation.  
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1 we have a sworn statement in the interrogatories and he can ask  
 2 again in the depositions. I don't see why we have this  
 3 additional procedure.

4 THE COURT: Yes. I mean, Mr. Mirro, to the extent you  
 5 have the interrogatory answer, they are stuck with it under  
 6 oath unless they can come up with some extraordinary  
 7 explanation, and I tell you what, if they come up with an  
 8 explanation, you can ask for whatever medical records you might  
 9 think relevant.

10 MR. MIRRO: That is fine, and believe me, your Honor,  
 11 we have considered that procedure. The only concern I have  
 12 with that procedure is, again, with so many plaintiffs in this  
 13 case, and if we begin down that road of collecting documents  
 14 after examinations have been taken, we are in the position of  
 15 having to re-examine the same plaintiffs again and that causes  
 16 some concern in terms of efficiency of how this is done.

17 THE COURT: I have no reason to doubt the veracity of  
 18 the interrogatory response. Mr. Milton recognizes -- he has

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19 been around the block -- how problematic it would be for his  
 20 client to suddenly come up with a broken leg, and it seems to  
 21 me that -- otherwise, you talk about problematic, you're going  
 22 to enter a new stip every time there is a nonanswer given in an  
 23 interrogatory, get everybody to sort of doublecheck and say  
 24 they didn't mean to say X and Y. It seems that the  
 25 interrogatories have in this instance served their purpose.

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1 They have narrowed the claim. It is a matter of stress, it is  
 2 not a physical injury, and it seems that any request for  
 3 medical history related to physical injuries, as far as I look  
 4 at it right now they would not be relevant and I don't hear you  
 5 say otherwise.

6 MR. MIRRO: I think we would be on board with that,  
 7 your Honor. We have to keep in mind there are numerous  
 8 plaintiffs here. We are looking at Steyert's responses. Some  
 9 of the plaintiffs claim that they were deprived of medication  
 10 while they were held in custody. There may be as well physical  
 11 medical records that are relevant in terms of the other  
 12 injuries, the psychological injuries that are alleged. I am  
 13 not quite sure, but I am willing to be guided by your thoughts  
 14 on this.

15 MR. MILTON: If I can just respond to that --

16 THE COURT: Of course, yes.

17 MR. MILTON: As we point out in our letter to the  
 18 court, we took a very broad view of what could be relevant.  
 19 For example, if someone claims they weren't allowed to have  
 20 their inhaler while at Pier 57, we turned over records of  
 21 treatment of whoever the doctor was that prescribed the  
 22 inhaler, so that he can verify that yes indeed they had an  
 23 inhaler. Even though we are not claiming an injury other than  
 24 the fact that they were deprived of an inhaler that potentially  
 25 inhibited breathing, we provided those records. It is not we

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1 didn't provide their orthopedic records.

2 MR. MIRRO: I will say this, your Honor. It is a  
 3 little bit complicated because there are so many plaintiffs.  
 4 We have received some photographs, for instance, from some of  
 5 these plaintiffs where they are showing physical injuries.  
 6 There are bruises, there are dermatological reactions, I assume  
 7 based on the claim that they were exposed to toxic substances  
 8 at the Pier. I think all of the plaintiffs are alleging that,  
 9 and some of the plaintiffs have submitted photographs  
 10 showing --

11 THE COURT: Let me try to cut this short because I  
 12 think there are some fairly clear parameters we are establish.  
 13 Part of what you are doing, Mr. Mirro, is arguing cases that  
 14 are not before me right now. It seems to me that if one of the  
 15 plaintiffs says that I had an allergic reaction or I was denied  
 16 my inhaler, that is a very specific claim of injury the  
 17 discovery for which should be commensurate with the specificity  
 18 of that claim. I think in that instance, for example, if  
 19 somebody says I didn't get my inhaler, I don't think that  
 20 entitles you to somebody's gynecological records.

21 I understand there are a lot of plaintiffs. This is a  
 22 difficult case, but welcome to life in the big city, right?  
 23 But I do think that the parameters here are fairly

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24 straightforward. Specific injuries, discovery is commensurate  
 25 with the specificity of the injury. Broadly alleged injuries  
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1 such as psychological harm I think open plaintiffs up to  
 2 broader discovery obligations, at least according to the cases  
 3 I have read, because it puts more of their psychological  
 4 history at issue. However, I am not insensitive to the point  
 5 made by Mr. Milton and it seems to me that I am going to  
 6 operate on his good faith. Where he doesn't think a protective  
 7 order doesn't adequately protect his client's interests and he  
 8 obviously doesn't think the material is relevant enough to be  
 9 turned over, turn it over to me for ex parte review, and just  
 10 tell Mr. Mirro so he is aware of what is going on. I  
 11 understand Mr. Mirro, that you don't object to that review of  
 12 an extremely sensitive case.

13 MR. MIRRO: That is fine. If he doesn't want to turn  
 14 it over, then I am perfectly willing to talk with you about it  
 15 on another occasion.

16 For clarification, I think the decision that it sounds  
 17 like we have come to is that you are not saying that all  
 18 medical records are undiscoverable at this point, you are  
 19 saying in those instances with respect to those plaintiffs,  
 20 where they are only complaining about psychological, then the  
 21 medical records would be not discoverable.

22 THE COURT: Yes, that is right.

23 MR. MIRRO: Where they are complaining about certain  
 24 types of physical injuries, they would be discoverable.

25 THE COURT: Certain medical records. If somebody  
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1 claims their teeth were knocked out, the dental records become  
 2 relevant. If they had an ingrown toenail, I don't think that  
 3 is relevant.

4 To use your phrase, Mr. Mirro, I think we are all  
 5 pretty much on the same page and we are going to deal with the  
 6 hard case in the future. Where there is something arguably  
 7 relevant and highly sensitive and Mr. Milton will submit it to  
 8 me for in camera review.

9 MR. MILTON: Can I take up Mr. Mirro's suggestion that  
 10 all these records be produced under a protective order?

11 MR. MIRRO: Yes, I have no problem with that. We are  
 12 not interested in embarrassing people. We want to reach the  
 13 merits of the case.

14 THE COURT: I assumed that, and that is why I threw it  
 15 out. So if somebody wants to get it prepared and send it to  
 16 me, I will sign it expeditiously.

17 MR. MIRRO: We have submitted a draft and hopefully we  
 18 will be hammering it out.

19 Your Honor, I agree that the psychological and  
 20 psychiatric issues are far more serious in this case, as far as  
 21 I can tell at this point. Are plaintiffs willing to produce  
 22 those records then, Mr. Milton?

23 MR. MILTON: It is a limited set of plaintiffs who  
 24 have been in therapy either before or after, to our claiming --  
 25 everyone is claiming at least some sort of emotional distress.

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1 The protective order goes a long way, thinking of individual  
2 clients here, to probably alleviate most of the clients'  
3 concerns, but not all the clients'. There may be a couple who  
4 may well be so upset by the prospect of turning over to the  
5 city lawyers, even ones as gracious as Mr. Mirro, their  
6 psychological records, that they may withdraw. We may enter  
7 into a stipulation if that is how Mr. Mirro would agree to do  
8 it, that they are not claiming emotional distress damages.

9 MR. MIRRO: I would be happy to work out anything  
10 along those lines.

11 MR. MILTON: But I think that is the minority and I  
12 think most of them, grudgingly but in compliance with the rules  
13 of the court, will turn them over.

14 MR. MIRRO: It is important for us to explore these  
15 conditions, to the extent they are in the case.

16 MR. MILTON: Different therapists operate differently.  
17 To the extent there are any records, we will see how relevant  
18 they are. So we will turn them over.

19 THE COURT: While I am moved to witness such harmony  
20 with counsel, we do have other matters we have to attend to.

21 I will assume you all will work it out and send to me  
22 to sign whatever it is you need to sign, or, Mr. Milton,  
23 whatever it is you need me to review.

24 There were a couple other issues, some of which are  
25 moot, some I am not sure. For example, employment records. To

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1 the extent there is no claim of loss, Mr. Mirro, what would be  
2 the relevance of employment records?

3 MR. MIRRO: Your Honor, all these plaintiffs are  
4 claiming serious psychological injuries. If they are working,  
5 we should be permitted to explore whether there are performance  
6 issues at work following the incident. On the other hand, I  
7 think we should be entitled to explore whether they had  
8 performance issues before the incident to compare with after  
9 the incident.

10 THE COURT: What if the psychological trauma they are  
11 suffering from is not of the type to affect performance but is  
12 still fairly harmful?

13 MR. MIRRO: I think that is a point but I think we  
14 should still be entitled to explore whether it is a performance  
15 issue at work or at school. I have taken depositions of some  
16 of these plaintiffs who claim that their relationships with  
17 family and friends and fellow employees were affected by the  
18 severe trauma following their arrest. I think we are entitled  
19 to explore that.

20 Please don't misunderstand. I am not suggesting that  
21 all the discovery that we collect in this case we are going to  
22 try to get into evidence.

23 THE COURT: I know, I know.

24 MR. MIRRO: But I do believe that we are entitled to  
25 discover the facts.

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1 MR. MILTON: May I respond?

2 THE COURT: Of course.

3 MR. MILTON: I believe Mr. Mirro maybe didn't clarify  
4 it but he is talking about another case. We have taken one

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5 deposition in this case and Mr. Thomas didn't testify that this  
6 affected his relationships with his family and at work. To the  
7 extent we claim that the ability to work has been affected, we  
8 have turned over the employment records. For people who have  
9 no claim that this affected their work, we didn't turn over the  
10 authorization. It is a pure fishing expedition. It would be  
11 to our benefit to turn it over if we claim it affected their  
12 performance. That would be an element of damages. But I don't  
13 see that they are entitled to fish around in our work lives.

14 THE COURT: I don't hear Mr. Mirro being interested in  
15 a fishing expedition. He has too many plaintiffs. So I think  
16 we are in agreement. To the extent that plaintiffs are  
17 claiming that the psychological affects effects of the alleged  
18 conduct affected work performance, it sounds like Mr. Milton is  
19 on board with giving you records that establish that fact or  
20 are relevant to that fact.

21 MR. MIRRO: Let me ask you this, your Honor. I hear  
22 what you are saying, but what comes to my mind is that the  
23 employment records are frankly potentially relevant in a number  
24 of ways and what I have articulated so far is only one of them.  
25 But the other possibility, I believe, is that they could very

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1 well show issues of -- a number of things. First, there could  
2 be statements in the employment records -- a lot of these  
3 plaintiffs are claiming that they were innocent bystanders  
4 swept up. What if the employment records show that on October  
5 30, 31, the plaintiff asked for two or three days off to be out  
6 of the office to attend these rallies or marches.

7 THE COURT: Do you really think that somebody when  
8 they went to their boss said I would like next Monday and  
9 Tuesday off because I want to protest, or did they just say I'm  
10 taking a personal day?

11 MR. MIRRO: I understand, your Honor, but this is a  
12 class action. Some of these people are employed -- we took a  
13 deposition a few days ago of a woman employed at the ACLU. All  
14 these situations are different, and I just think that we are  
15 entitled to ask the question did they take some days off or did  
16 he take some days off around that time period, and is there any  
17 record of what the reason was. Similarly, after the  
18 incident -- I'm sorry, I have lost my train of thought again --  
19 after the incident, were any statements made to the employer  
20 about reasons that they were out of work, what was said. Those  
21 are admissions. Those could very well be admissions. Somebody  
22 says, I decided to engage in civil disobedience and I got  
23 arrested and that's why I wasn't able to come in to work a  
24 couple days.

25 MR. MILTON: May I respond to that?  
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1 THE COURT: Yes, of course.

2 MR. MILTON: Again, the interrogatories ask for that  
3 information. They ask for any statements made and any  
4 witnesses that may have relevant information. To the extent  
5 that those categories of requests overlap with people at the  
6 plaintiff's work, he has that information. But without  
7 anything else to go on, it is really a fishing expedition.

8 MR. MIRRO: It is not a fishing expedition. There are  
9 also questions of disciplinary history and whether those



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10 records might go to credibility of witnesses. All of these  
11 plaintiffs are going to be witnesses in this case.

12 THE COURT: It seems to me, the convention took place  
13 the last week of August, so the fact that somebody went to  
14 their employer and said I want to take a couple days off, there  
15 are employees around the land taking days off. It seems to me  
16 there is a way to narrow this rather than allowing you to  
17 rummage through employment records. As Mr. Milton pointed out,  
18 some of this was covered in interrogatories and prior  
19 statements, but the mere fact that somebody took time off  
20 doesn't mean that they took off time to protest. They could  
21 have come to be tourists.

22 I confess I haven't been able to parse out every  
23 single allegations in every complaint, but some of the  
24 allegations are that people were here as tourists and were  
25 scooped up in these arrests. Their employment records would

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1 show that they were not improperly playing hooky from work.  
2 MR. MIRRO: I appreciate your comment. That is not  
3 where I was heading, though, with the argument. I think you  
4 are absolutely right, there are allegations that some of these  
5 individuals were here as tourists, but I think the flip side is  
6 that we should be entitled to test that, and one way to test  
7 that is to see what the records say when they took the days  
8 off.

9 THE COURT: What I was going to say is, anything  
10 having to do with why the plaintiffs might not have been  
11 working, anything to do with what if any statements were made  
12 by plaintiffs to their employers, or, frankly, anybody else,  
13 and whether or not they have discipline problems of a type that  
14 would be relevant to this case can be discretely sought, rather  
15 than a general, we want employment records of the plaintiffs.

16 MR. MIRRO: I would be happy to go along with that,  
17 your Honor. Perhaps the plaintiffs can take a second look at  
18 these questions and identify -- if they can identify from their  
19 employer, identify any statements that might be relevant. I  
20 would be happy to go along with that. It is not an ideal  
21 situation, obviously, because we are leaving it in the hands of  
22 the plaintiffs to determine what they are going to produce to  
23 us.

24 MR. MILTON: If I can just respond, the issue of the  
25 employment, again for people who aren't claiming that this

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1 affected their work in any way, I don't see under this theory  
2 that they may have made statements or something that goes to  
3 their credibility, that could be said with respect to every  
4 aspect of these people's lives.

5 THE COURT: I agree. If a plaintiff has something in  
6 their employment file, a discipline because they were tardy for  
7 a meeting, that has nothing to do with this case. I think,  
8 frankly, the request having to do with disciplinary problems  
9 has to be very, very narrow and relate to the issues in this  
10 case. I agree with Mr. Milton that this has to be a discrete  
11 request.

12 Mr. Mirro, if you want this stuff, you will have to go  
13 back and narrow your requests. You are not entitled to look  
14 for the proverbial needle in the haystack by asking for all the

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15 employment records. Mr. Milton is right, to the extent that  
 16 there might be something relevant, that is in every case. But  
 17 I do think Mr. Mirro is entitled to challenge, to the extent  
 18 that he has a good-faith basis to do so, the statements by some  
 19 of the plaintiffs that wherever they were at the time of their  
 20 arrests they were not involved in some sort of protest.

21 Mr. Mirro, I will say, they may very well concede that  
 22 they were there protesting and that it was entirely lawful.  
 23 But to the extent people are saying they weren't even in the  
 24 vicinity it seems anything from their employment record would  
 25 shed light on that. But that is a very narrow definition and

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1 you will have to narrow your request.

2 MR. MIRRO: Thank you, your Honor.

3 THE COURT: Anything else we need to take up?

4 MR. MILTON: I assume your analysis applies to his  
 5 request for school records.

6 THE COURT: Yes. The issue on school records, I  
 7 gather, is the theory that if somebody protested in college  
 8 that somehow that might be relevant. That is shaky at best and  
 9 I am not sure it would come in at trial, but of course that is  
 10 not the test.

11 MR. MIRRO: Your Honor, let me make a comment about  
 12 that. Much of this case from my perspective, and I don't think  
 13 I am giving away too much here, to a large degree, everyone  
 14 knows what the plaintiffs did on August 31 or August 27. Very  
 15 much this case is going to go to what the plaintiffs were  
 16 intending to do and what they thought they were doing when they  
 17 were doing what they were doing on August 31. In other words,  
 18 it is a mental state of mind. A lot of these questions are  
 19 going to state of mind and intent of the demonstrators who were  
 20 arrested. A lot of these people have a long history of civil  
 21 disobedience. We are not interested in tardiness from work or  
 22 school. We are interested in records that say here is a guy  
 23 that has a pattern and practice, a habit and routine of taking  
 24 off every day when there is an antiBush rally in the city or  
 25 the region and it's a problem for us. The reason we are

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1 interested in that is because it establishes a practice, a  
 2 habit, a routine. It establishes that sort of evidence for us.  
 3 It shows that he wasn't swept up or she wasn't swept up as an  
 4 accident. That is what we are interested in pursuing.

5 MR. MILTON: May I respond?

6 THE COURT: Of course, go ahead, Mr. Milton.

7 MR. MILTON: If I can briefly respond, again, I don't  
 8 know where he gets the fact that a lot of these people have a  
 9 long history of civil disobedience. That is not true and in  
 10 fact we freely admit in the interrogatories that some of our  
 11 plaintiffs in the past have engaged in civil disobedience but  
 12 that is not most of them. Again, we will fight about how  
 13 relevant that is, that in the past they blocked a street and  
 14 whether that has to do with whether or not they were blocking a  
 15 street in the Republican Convention.

16 THE COURT: I think you all have done yeoman's work on  
 17 behalf of your client and each has made the point I made  
 18 before. I think it is relevant for discovery purposes if  
 19 somebody has some sort of past involvement in civil

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20 disobedience or protesting and that does not allow Mr. Mirro to  
 21 fish around employment and school records, but he can freely  
 22 have access to the information that is relevant to that claim.  
 23 I don't care what grades they got, I don't care if they were  
 24 late for class, I don't care if they got caught with the dean's  
 25 daughter.

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1 So let's narrow the request. I think you are entitled  
 2 to ascertain that information. I think you have a hill to  
 3 climb as to whether or not it will be relevant at trial but we  
 4 will cross that bridge when we come to it.

5 MR. MIRRO: There were a couple other things, your  
 6 Honor if you have a moment.

7 THE COURT: I have a couple moments because I have a  
 8 long scheduled motion to transfer a case.  
 9

10 MR. MIRRO: With respect to Professor Chris Thomas, he  
 11 testified that there were about a dozen photographs that his  
 12 son had taken. He testified that he believed those photographs  
 13 were sent to his attorneys. We have not received -- although  
 14 the plaintiffs' attorneys have promised some of those  
 15 photographs, we have not received any.

16 THE COURT: Mr. Milton.

17 MR. MILTON: Yes. I have a letter in front of me  
 18 dated August 26, a cover letter for everything we have. So he  
 19 either has them or will have them soon. So I think that issue  
 20 is moot. Any confusion about the photographs, we are not  
 21 hiding anything --

22 MR. MIRRO: Are all the photographs being produced to  
 23 us, David?

24 MR. MILTON: I am looking at this cover letter, which  
 25 I didn't write. Everything he asked and that we have been able

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1 to locate and everything that his other attorney has, which is  
 2 the cause of some of the confusion. I realize your concern  
 3 that we are hiding something but we are well aware of our  
 4 ethical obligations and our obligations under the rules.

5 MR. MIRRO: My concern is that the professor testified  
 6 that there were a dozen photos and that he believes he sent  
 7 them to his attorneys, and the attorneys tell me there are two  
 8 or three or four that they are able to put their hands on. I  
 9 don't know what, frankly, to make of that.

10 MR. MILTON: This cover letter is sending you 27  
 11 photos and all the negatives that he has. You're getting  
 12 everything. I don't know what else to say. You have what we  
 13 have.

14 MR. MIRRO: We will see what is produced then.

15 THE COURT: Anything else?

16 MR. MIRRO: Your Honor, I don't mean to become overly  
 17 technical, but can you give us some guidance on the objections  
 18 that have been stated on these general objections that have  
 19 been stated in the discovery responses, because I am very  
 20 concerned about what is out there and what may not get  
 21 produced.

22 THE COURT: Tell me what you are not getting that you  
 23 think you are entitled to. I read through the interrogatory  
 24 responses and I read general obligations interposed and phrases

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25 like not withstanding, here is the answer. There were a whole  
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1 series of questions about arrests for disobedience and a series  
2 of general objections and specific answers. That is the time  
3 honored projection. Give me your best shot of what you think  
4 you haven't been given as a result of these general objections  
5 that we otherwise haven't covered today.

6 MR. MIRRO: Your Honor, I can't give you an answer.  
7 It is like proving a negative. These objections, they  
8 basically got a half dozen or 10 general objections that they  
9 have asserted with respect to each and every interrogatory, and  
10 the whole thing is not internally consistent. The logic in  
11 these answers is not at all consistent and it is completely  
12 unclear what is being held, what is being turned over, where  
13 there is an objection asserted or not an objection asserted. I  
14 don't mean to be overly technical and maybe I should stop now,  
15 but this causes me concern because I don't know where we are.

16 THE COURT: Give me an example where you think  
17 plaintiffs have the information you want but they are not  
18 giving it to you because of one of these general objections.

19 MR. MIRRO: How can I do that, your Honor? I have no  
20 idea. All I know that they have asserted a general objection  
21 to every request.

22 THE COURT: But then they give you an answer.

23 MR. MIRRO: Not every one.

24 THE COURT: Give me an example that is making you  
25 nervous.

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1 MR. MIRRO: I have to take a look at this.  
2 There are a whole series here where they have said not  
3 applicable.

4 THE COURT: Give me your best shot.

5 MR. MILTON: As I explained in my letter to Mr. Mirro  
6 prior to the letters to the court, somewhat based on the  
7 wording of his question, where it is provide every example of  
8 such and such and if there was never a such and such, we said  
9 NA, but as I explained, it just means no, bad attempt at  
10 legalese perhaps.

11 MR. MIRRO: Under the request document, not applicable  
12 answer is used with respect to No. 3, 4, 5, 6, 7, 8. We are  
13 not getting any information from those requests, your Honor.

14 MR. MILTON: Again, it is fully explained in my letter  
15 that we mean no such documents exist and I apologize, or we  
16 apologize for using what you think is cryptic. In the future  
17 we will use more, you know, explicit prose.

18 MR. MIRRO: I don't have any more information on what  
19 might be withheld.

20 THE COURT: Mr. Mirro, number 11, state whether  
21 plaintiff has made a claim with any insurance carriers for  
22 physical, mental or emotional injuries within the past 10  
23 years. This is right off the interrogatory response from  
24 Steyert. Answer, not applicable. Mr. Milton says that means  
25 there is none.

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1 Basically what you are saying is you don't believe  
 2 that or you don't know if it is true, but I don't know what you  
 3 want me to do. He is saying it means there aren't any. You  
 4 made a comment earlier that some of this depends on plaintiffs.  
 5 That is the nature of discovery. You are depending on an  
 6 officer of the court meeting his obligations, and when they say  
 7 there aren't any more documents available, I don't know what  
 8 more you want a court to do.

9 MR. MIRRO: I understand, your Honor. To clarify, I  
 10 am concerned with the fact that they have asserted every single  
 11 objection to every --

12 THE COURT: This can't be the first time you have seen  
 13 this.

14 MR. MIRRO: That's fine.

15 THE COURT: That is standard practice. I am not  
 16 saying it is commendable but it is standard. You are telling  
 17 me you haven't interposed general objections and either given  
 18 an answer preserving the objection or then said in addition to  
 19 the objection, we don't have the documents?

20 MR. MIRRO: To answer the judge's question I would say  
 21 this, your Honor. I feel when I respond to interrogatory and  
 22 document requests that I have an ethical obligation to do this  
 23 right, and the way I do it, when I have general objections, I  
 24 might have only a handful of objections related to privileges  
 25 or something like that, but I answer each particular question

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1 and object to the particular question based on what I believe  
 2 to be the case. In this case it is expressly different. They  
 3 have made every objection applicable to every document request  
 4 and interrogatory. I understand we are all officers of the  
 5 court but I don't think that is consistent with Rule 11. As a  
 6 litigant, I don't know what to make of it.

7 THE COURT: As I said, I don't think it is a  
 8 commendable way to practice but tell me what you want me to do.

9 MR. MIRRO: Maybe there is nothing. I guess in an  
 10 ideal world I would ask the plaintiffs to amend their responses  
 11 and submit proper responses.

12 MR. MILTON: If I can just add, not only do we have --  
 13 for the vast majority we say blah, blah, blah, we object, we  
 14 object, notwithstanding, here is the information you want, but  
 15 we state specific objections to specific questions. It is very  
 16 clear what the bases of our objections are.

17 MR. MIRRO: But all of that is -- perhaps it is  
 18 technical and I am going to let it go, your Honor, but I made  
 19 the point by raising it with you. It concerns me greatly and I  
 20 don't know what I am supposed to understand about what  
 21 information is out there or not, but I am willing to live with  
 22 it.

23 THE COURT: Mr. Milton, the point is well taken by  
 24 Mr. Mirro. When I say it is the standard practice, I don't  
 25 think it is something we should shoot for. I will take another

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1 run and if there is something that he thinks I should do, I  
 2 will hear him.

3 So do the best to give specific objections to specific  
 4 requests. You will use those only in good faith and otherwise  
 5 you will respond, just like he will respond to your requests

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6 and give specific objections only where applicable.

7 MR. MILTON: Right. We already served our  
8 interrogatories, so I am not sure as a practical matter how to  
9 implement that, unless there is something that Mr. Mirro comes  
10 back with. There is nothing that we are withholding pursuant  
11 to the general objections and not pursuant to a specific  
12 objection made within the body of the particular response.

13 THE COURT: I think that is Mr. Mirro's point. He is  
14 not entirely clear on that. So, Mr. Mirro, if you have  
15 specific questions that you want to take up with Mr. Milton, go  
16 ahead, and if you think there is a possibility for relief, go  
17 ahead and I will hear you.

18 MR. MIRRO: OK, your Honor. I am not sure I have  
19 anything more to add.

20 THE COURT: Is there anything else we need to take up  
21 now? Mr. Milton, I know you will think about the issue with  
22 regard to the recollection with regard to the notes.

23 MR. MILTON: Right. What is the timetable? Mr.  
24 Mirro, you are going to go gone this week?

25 MR. MIRRO: Your Honor, I will be unable for the  
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1 remainder of the week. I am taking some time just in time to  
2 get hit by the hurricane. But I will be available any time  
3 starting next week and perhaps we can put together some  
4 thoughts between now and then.

5 THE COURT: Mr. Milton, why don't we say by a week  
6 from wednesday you will let me know your final position on  
7 this.

8 MR. MILTON: OK.

9 THE COURT: That gives a day or so after Mr. Mirro  
10 gets back from his vacation.

11 MR. MIRRO: Your Honor, I wanted to mention one other  
12 thing before we get off the phone and that is, your chambers  
13 reached out a week ago to ask about the status of the  
14 consolidated order and/or the proposed protective order  
15 relating to certain materials in these cases. Let me tell you  
16 the status very briefly. I drafted both of those items at  
17 least a month ago and we circulated them to plaintiffs'  
18 counsel, all the plaintiffs' counsel, and we have not heard  
19 anything until just recently. With respect to the protective  
20 order, there are a long list of objections from plaintiffs'  
21 counsel. I will try to work those out with plaintiffs'  
22 counsel. With respect to the discovery order, I am happy to  
23 say that David and I sat down a couple of days ago and we were  
24 able to hammer out, I think, what I think we will be able to  
25 submit to you as a proposed consolidated discovery order.

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1 MR. MILTON: With the caveat, and I told this to Mr.  
2 Mirro, I don't claim to be representing the numerous  
3 plaintiffs' counsel in the case. He told me he has not heard  
4 any objections from them, so I am going to communicate with all  
5 them and see if they are on board with what Mr. Mirro and I are  
6 hammering out, which I hope and reasonably expect they will be,  
7 in which case we will be able to represent this is the order we  
8 are all bound by.

9 THE COURT: I appreciate what you are telling me. It  
10 sounds like there is some momentum.

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11 MR. MIRRO: The only concern, your Honor, we have a  
12 series of higher level NYPD witnesses who one of the plaintiffs  
13 in one of the cases would like to begin deposing in the next  
14 few weeks. We are not sure that timetable is going to work.  
15 We are willing to produce them but we are not sure the  
16 timetable is going to work, given that we don't have the  
17 consolidated discovery order in place, which will allow  
18 procedures by which everyone could participate in those  
19 depositions. We think that is important to do.

20 THE COURT: I think it is important too and I would  
21 ask you to convey my strong desire to all counsel involved in  
22 this to get this done so we don't affect that schedule, because  
23 none of this is going to work if people aren't on board with  
24 some basic principles that are reflected in that order.  
25 Otherwise this whole thing is going to unravel and we can't

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1 have that. So if counsel who are on the phone could just  
2 convey that and do the best they can to wrap this up, because I  
3 am not inclined to let schedules slip. I will bring everyone  
4 in and nobody will leave until we have it out.  
5 Have a nice vacation, enjoy the rest of the week.  
6 (Proceedings adjourned)  
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